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No. 87-1726

In the Supreme Court of the United States

OCTOBER TERM, 1988

SULTAN EL GAWLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's supplemental jury instructions on entrapment were correct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 837 F.2d 142.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on January 19, 1988. A petition for rehearing was denied on February 17, 1988 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on April 19, 1988, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to export defense articles without a license or

the approval of the State Department, in violation of 22 U.S.C. 2778(b)(2) and 22 C.F.R. 121.1(b), Category V(A). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 1a-21a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-6a). It showed that petitioner, who came to the United States from Egypt in 1969 and became an American citizen in 1977, owned and operated a travel agency. In June 1985, petitioner met Momdouh Zakkary Girguis (Zakkary), an Egyptian businessman, when Zakkary purchased airline tickets from petitioner's travel agency. On July 31, 1985, Zakkary visited petitioner's agency again. During that meeting, petitioner asked Zakkary whether Zakkary could assist him in procuring arms for Palestinian revolutionaries. Zakkary pretended to be familiar with arms sales in order to determine whether petitioner was serious. Zakkary met again with petitioner in August and September 1985 to continue the discussion. *Id.* at 3a.

On September 19, 1985, Zakkary informed a Customs Service auditor about his discussions with petitioner. Zakkary thereafter agreed to pose as an arms dealer and to tape record his conversations with petitioner. In a meeting on November 8, 1985, Zakkary described a supposed liaison with an American soldier who could provide weapons. Four days later, petitioner introduced Zakkary to Said Hassan, a representative of the Palestinian Liberation Organization (PLO) in Saudi Arabia. Hassan told Zakkary that he needed explosives and detonation devices for the "revolution people" in the Middle East. Hassan and Zakkary thereafter decided to conduct all further arms discussions through petitioner, who agreed to act as an intermediary. Pet. App. 4a.

In a meeting on November 15, 1985, Zakkary quoted prices to petitioner for the requested explosives and

detonating devices. Petitioner agreed to a price of $12,000 for the arms and $13,000 for Zakkary's expenses. When Zakkary complained of financial difficulties, petitioner explained that he himself would be receiving no remuneration, stating: "I am doing this for the sake of God. I am personally not going to gain anything out of it." Pet. App. 4a-5a.

On December 5, 1985, Zakkary brought a sample explosive to the travel agency, and petitioner called Saudi Arabia to tell the PLO representative that the explosives were ready for shipment. On December 13, petitioner and Zakkary met with Hassan to discuss prices, and on December 17, petitioner and Zakkary met to discuss procuring helicopters. Petitioner was arrested the following day. Pet. App. 5a.

2. Petitioner admitted at trial that he had agreed to serve as an intermediary in the arms negotiations, and that he knew that his conduct was wrong. He claimed, however, that he had been entrapped. Pet. App. 5a. The district court accordingly instructed the jury on the entrapment defense. Neither petitioner nor the government objected to that charge. After two hours of deliberations, the jury requested further instructions on entrapment. The district court reread its original charge and sent the jury back to resume deliberations. *Id.* at 6a.

The following day, the jury asked for further instructions on entrapment. Over defense counsel's objection, the district court gave a supplemental charge, stating in pertinent part that "it remains on the Government to prove beyond a reasonable doubt that the defendant was not induced by the Government to commit the crime or they must prove beyond a reasonable doubt that he was predisposed to commit the crime." Pet. App. 6a (emphasis omitted). The jury resumed deliberations, and shortly thereafter it returned a guilty verdict (*id.* at 7a).

3. The court of appeals affirmed (Pet. App. 1a-21a). The court rejected petitioner's claim that the supplemental entrapment instructions were erroneous. Petitioner had contended that, in order to disprove an entrapment defense, the government must negate the defendant's showing of inducement and must also prove that the defendant was predisposed to commit the crime. The court of appeals disagreed, explaining (*id.* at 12a) that "entrapment can be disproved in one of two ways, either by proving beyond a reasonable doubt that the defendant was not induced, or by proving beyond a reasonable doubt that he was predisposed to commit the crime."

ARGUMENT

1. In its supplemental instructions, the trial court explained to the jury it could reject petitioner's entrapment defense if it concluded that the government had either disproved inducement or, alternatively, that it had shown that petitioner was predisposed to commit the offense. Petitioner contends (Pet. 5-10) that those instructions are mistaken, because in his view the government must make both showings in order to defeat an entrapment defense.

There is no merit to that contention. As this Court explained in *Mathews* v. *United States,* No. 86-6109 (Feb. 24, 1988), slip op. 4, "a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." If either element is missing, the defense must fail. For that reason, the courts of appeals have consistently held that the government may overcome the defense of entrapment by proof sufficient to disprove either prong of the defense. See, *e.g., United States* v. *Gunter,* 741 F.2d 151, 153 (7th Cir. 1984); *Sagansky* v. *United States,* 358 F.2d 195, 203 (1st Cir.), cert.

denied, 385 U.S. 816 (1966). Indeed, the courts have required a showing of "inducement by a government agent *and* a lack of predisposition by the defendant" before even submitting an entrapment claim to the jury. *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.) (emphasis in original), cert. denied, 464 U.S. 1012 (1983). See also *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Anglada*, 524 F.2d 296, 298 (2d Cir. 1975); *United States* v. *Armocida*, 515 F.2d 49, 55 (3d Cir.), cert. denied, 423 U.S. 858 (1975).*

2. There is no merit to petitioner's contention (Pet. 10) that the district court's supplemental instruction on entrapment was inconsistent with its original charge. In its original charge, the district court stated that "[t]he government must prove beyond a reasonable doubt in addition to [the] elements of the offense itself that the defendant was not entrapped" (C.A. App. 808-810 (quoted in Appellant's Br. 22)). In its supplemental charge, the district court further explained that "it remains on the Government to prove beyond a reasonable doubt that the defendant was not induced by the Government to commit the crime or they must prove beyond a reasonable doubt that he was predisposed to commit the crime" (Pet. App. 6a (emphasis omitted)). The latter instruction was merely an elaboration

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* Petitioner contends (Pet. 5-8) that the decision of the court of appeals is inconsistent with the Third Circuit's prior decision in *United States* v. *Castro*, 776 F.2d 1118 (1985), cert. denied, 475 U.S. 1029 (1986). As the court of appeals explained (Pet. App. 14a-15a), however, the *Castro* case simply holds that a district court must instruct the jury that the burden of disproving both elements of the defense is on the government. The case does not hold, as petitioner suggests, that the government must actually disprove both elements in order to defeat the defense. In any event, petitioner's claim of an intracircuit conflict is for the court of appeals, and not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

of the former, and it was entirely responsive to the jury's request for further clarification. See *Bollenbach* v. *United States,* 326 U.S. 607, 612-613 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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